In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 324

ANTHONY ALTIERI, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In December, 1965, petitioner was indicted in the United States District Court for the District of Rhode Island on three counts of wilfully attempting to evade his income taxes in violation of Section 7201 of the Internal Revenue Code of 1954. Upon arraignment he pled guilty to Count III, relating to the year 1963, and not guilty to the other two counts. He was sentenced to a 15-month prison term and was fined $5,000. (Pet. 3-4; R. 1a.) When petitioner appeared

for sentencing the United States Attorney advised the court, *inter alia*, that the source of the unreported income alleged in the indictment was an abortion mill operated by petitioner, and that he had performed 249 abortions in 1963 alone, for which he had received fees ranging from $250 to $1,300. (R. 3a.)

Petitioner did not object to the United States Attorney's reference to his abortion practice. Rather his counsel sought to turn it to his advantage in these words (R. 6a):

> * * * one of the primary motives that this defendant had in pleading guilty to this charge was the fact that there are a number of people that would be hurt if this went to trial. These girls, your Honor, would have to come into court and testify and they would be hurt; not only they, but their spouses, their husbands, your Honor, their families. And that is an important consideration, your Honor.
>
> Secondly, that particular charge, the source of the income, the abortion, your Honor, this is something that this man still has to face. He has a charge pending in the state court on that, and it would appear to me that if this were taken into consideration today, your Honor, the penalty would be imposed upon him twice: here and also in the state court.[1]

Petitioner's present contention, that the United States Attorney committed reversible error in apprising the court of the source of the unreported income,

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[1] On two subsequent occasions defense counsel also argued in mitigation of sentence that the petitioner was facing abortion charges in the state court. (R. 7a, 8a.)

is wholly without merit. Even on the issue of petitioner's guilt or innocence such evidence would have been relevant and admissible, although it might also show the commission of other crimes. *Armstrong* v. *United States*, 327 F. 2d 189, 194 (C.A. 9); *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7), certiorari denied, 335 U.S. 853; *United States* v. *Guidarelli*, 318 F. 2d 523 (C.A. 2). *A fortiori*, the trial judge was fully justified in taking it into account, if he did so, on the question of what sentence should be imposed.[2] A court has wider latitude of inquiry in fixing the sentence during a contest to decide the issue of guilt. *Williams* v. *New York*, 337 U.S. 241, 246; *Armpriester* v. *United States*, 256 F. 2d 294, 297 (C.A. 4). In the *Williams* case this Court stated (337 U.S. at 247):

> A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts

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[2] The prison sentence of 15 months is well within the five-year maximum provided by Section 7201. There is no showing in the record that the imposition of that sentence resulted from the disclosures of the United States Attorney as to source of income. In an affidavit filed with the court of appeals, the U. S. Attorney flatly denied having advised defense counsel that Judge Day had never imposed a prison sentence in a tax evasion case. (Appendix A, *infra*, p. 6.)

> individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherance to restrictive rules of evidence properly applicable to the trial.
>
> Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. * * *

This record does not disclose whether there was a pre-sentence investigation resulting in a probation report,[3] but we submit that no more harm could have come from the United States Attorney's recitation of the facts in question than if they had been recited in such a report. A probation report will certainly give the social and economic background of a defendant, including the fundamental matter of how he earns his living, and the nature of charges pending against him in a state court. Moreover, if such information is contained in a probation report the defendant may have no opportunity to contradict or rebut it. *Hoover* v. *United States*, 268 F. 2d 787, 790 (C.A. 10). In the instant case petitioner had every opportunity to contradict or rebut the allegations but chose not to do so.

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[3] See Rule 32(c)(2) of the Federal Rules of Criminal Procedure. The fact that petitioner indicates he was interviewed by a federal probation official suggests that the court did have the advantage of a probation report. (Pet. App. C.)

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

MEYER ROTHWACKS,
RICHARD B. BUHRMAN,
Attorneys.

AUGUST 1966.

APPENDIX A

State of Rhode Island
Providence, Sc.

AFFIDAVIT

I, RAYMOND J. PETTINE, of the City and County of Providence, State of Rhode Island, being duly sworn, on solemn oath depose and say:

That I am United States Attorney for the District of Rhode Island and have occupied that office since April 19, 1961. Likewise, I occupied said office in the months of January and February, 1966. In those months, I had occasions to discuss the case of the United States of America v. Anthony Altieri, Jr., et al., Indictment No. 7238, pending before the United States District Court for the District of Rhode Island, with attorneys for the defendant, Anthony Altieri, Jr. In no discussion with any of the attorneys did I represent that in my term of office Judge Edward W. Day, Judge of said District, did not impose a sentence upon a tax evasion charge. To the contrary, I unequivocally state that I represented to said attorneys that it was not my prerogative to assume what sentence the Court might impose and that in my experience it was not Judge Day's practice to indicate what sentence he would impose.

It would have been impossible for me to represent that the Court never imposed sentence upon a tax evasion charge in the period in which I have occupied the office of the United States Attorney since such a statement would conflict with the record and truth.

/s/ RAYMOND J. PETTINE

State of Rhode Island
Providence, Sc.

Sworn and subscribed to before me at Providence, Rhode Island, this 10th day of May, 1966.

/s/ WILLIAM J. GEARON
Notary Public. [SEAL]
My Commission Expires 6/30/66

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